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Federal Communications Commission
Office of the Secretary

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November 6, 1991

ORIGINAL

*LL.M. IN TAXATION

VIA HAND DELIVERY

Ms. Donna Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Robert M. Richmond
Beaumont, California
FCC File No. BPH-910703MD
Our File No. 2072-001

OPPOSITION TO PETITION TO DENY

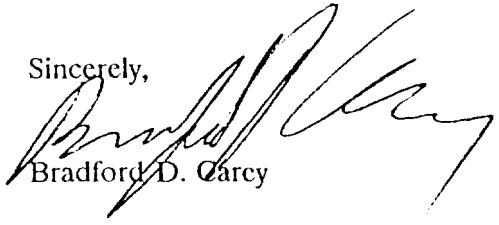
Dear Ms. Searcy:

Enclosed please find an original and four (4) copies of an Opposition to Petition to Deny filed on behalf of Robert M. Richmond, an applicant for a new FM construction permit at Beaumont, California.

Should the Commission have any questions regarding this matter, kindly contact the undersigned, counsel to Robert M. Richmond.

With best of personal regards, I am

Sincerely,


Bradford D. Garey

/jg

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BEFORE THE
Federal Communications Commission

Federal Communications Commission
Office of the Secretary

WASHINGTON, D.C. 20554

IN RE

APPLICATION OF
ROBERT M. RICHMOND
FOR NEW FM CONSTRUCTION PERMIT
CHANNEL 265A
BEAUMONT, CALIFORNIA

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FCC FILE BPH-910703MD

TO: CHIEF, MASS MEDIA BUREAU,

OPPOSITION TO PETITION TO DENY

Robert M. Richmond ("Richmond"), an applicant for a construction permit to build a new FM station on Channel 265A at Beaumont, California, by his attorneys, hereby opposes the Petition to Deny filed by Serna Broadcasting, Inc. ("Serna") on October 22, 1991. Serna's Petition, viewed most favorably to Serna, has but a slight facial appeal to it, is devoid of substance, and lacks a cognizable reason for the denial of Richmond's Application. Serna asserts that Richmond¹

is short-spaced to the pending application of KATY-FM, Idyllwild, California to make a change in its transmitter location (FCC File BMPH-910611IF).

Assuming, *arguendo*, the factual accuracy of Serna's Petition, and the correctness of the legal arguments it asserts in Paragraphs 1 and 2, all Serna has demonstrated is that the

1

and several other applicants that specified the same site as did Richmond

application for a change in transmitter location of KATY-FM, which was filed on June 11, 1991 (FCC File BMPH-910611IF) (within the window period for the Beaumont applications), is in conflict with the Beaumont applications specifying the site selected by Richmond.

Public Notice of the acceptance of the Application of Kay Sadlier-Gill, permittee of KATY-FM, to modify the facility was not given by the Commission until June 27, 1991² - - a Thursday. Pursuant to the then extant Commission rules, public notice was effective the following day, Friday, June 28, 1991. The Beaumont applications were filed on or before Wednesday, July 3, 1991 with the exception of Serna's, which was filed on July 5, 1991.

By the time the Commission gave public notice of the acceptance of Sadlier-Gill's application, Richmond's site was already selected and reasonable assurance of its availability obtained. Richmond's engineer had already prepared the engineering portion of the Application. At the time the engineering portion of the Application was prepared, to timely meet the Commission's filing window, there was no opportunity for Richmond or his engineer to have known of the Sadlier-Gill Application. Under these circumstances any processing system which led to the denial of Richmond's Application would be (1) arbitrary; (2) capricious; and (3) contrary to law.³

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See BAPS Facility/Application Information Report, from 91/10/01 to 91/10/24, page 147, for which Official Notice is requested, a copy of which is annexed hereto as Exhibit 1.

3

Richmond notes that the same consulting engineer prepared Sadlier-Gill's Amendment and Serna's Application. Prior to issuance of the Public Notice of Sadlier-Gill's Amendment, the consulting engineer was the only person with access to the information contained in the Amendment. The other parties to this proceeding cannot be held accountable for inside information available only to Serna (and Sadlier-Gill) and their engineer.

The Commission has established precedent to deal with this situation.

On January 26 and 27, 1988, applications were filed with the Commission seeking a construction permit on Channel 260 C2 at Liberty, Texas. The sites specified in two of those applications were short-spaced to the site proposed by the licensee of existing Station KHLA in an amendment which had been filed on January 11, 1988 to its Application seeking a permit authorizing modifications to KHLA. The Commission notified the licensee of KHLA of the short-spacing by letter and afforded it a period of thirty (30) days in which the KHLA Application could be amended to eliminate the spacing deficiency. By the time the Commission adopted its *Hearing Designation Order*, DA 90-345 (released April 4, 1990) in MM Docket No. 90-136, KHLA had not amended its Application. Therefore, the Mass Media Bureau included KHLA's Application in the *Hearing Designation Order* as "being considered on a mutually exclusive basis with the conflicting applications for the Liberty channel," citing *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936, 19941 (May 13, 1985) (*Report and Order*).

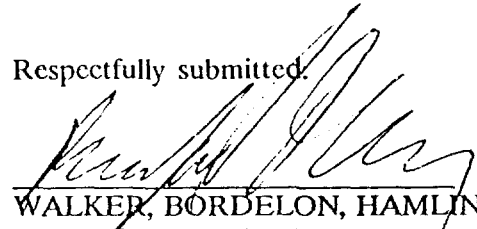
That *Report and Order* specifically provides that any mutually exclusive applications for new facilities or for modifications to existing facilities filed during the window for new applications will be grouped for comparative hearing. Sadlier-Gill's Amendment, filed July 11, 1991, was filed within the Beaumont window period, which extended from June 3 to July 3, 1991. As a matter of law, her Application must, if otherwise acceptable, be consolidated with the Beaumont applications.

The Bureau should accordingly afford Sadlier-Gill an opportunity to amend her Application to eliminate the spacing deficiency her Application has encountered with respect to Richmond's Application and the other Beaumont applications. If Sadlier-Gill fails to amend her Application, the *Hearing Designation Order* to be issued for the Beaumont facility

must, according to the *Report and Order*, consolidate Sadlier-Gill's Application for hearing if she is otherwise qualified and her Application otherwise acceptable.

In view of this clear procedure of the Commission, Serna's Petition to Deny is clearly without merit and should be **DENIED**.

Respectfully submitted,



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Counsel to Robert M. Richmond

November 6, 1991

EXHIBIT 1



CERTIFICATE OF SERVICE

I, Janet Green, a secretary in the law firm of Walker, Bordelon, Hamlin, Theriot & Hardy, do hereby certify that true copies of the foregoing document were sent this 6th day of November, 1991, via first-class United States mail, postage prepaid, to the following:

- * Mr. Dennis Williams
Chief, FM Branch
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JANET GREEN

* BY HAND